SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-892

THOMAS RICHARD MANN,

Petitioner,

vs.

STEWART C. SMITH, Chief Probation Officer, San Bernardino County, and LOWELL E. LATHROP, District Attorney, San Bernardino County,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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STEWART C. SMITH, Chief Probation Officer, San Bernardino County, and LOWELL E. LATHROP, District Attorney, San Bernardino County,

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BRIEF OF RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been published in the Federal Reporter. A copy of that opinion appears in the appendix to the petition for writ of certiorari. (Appendix to Petn., pp. 1-10.)

The prior order of the United States District Court for the Central District of California denying petitioner's application for a writ of habeas corpus and dismissing the petition is also reproduced in the appendix to the petition for writ of certiorari. (Appendix to Petn., pp. 11-15.)

The prior opinion of the California Supreme Court in state proceedings is reported as *Mann v. Superior Court*, 3 Cal. 3d 1, 88 Cal. Rptr. 380, 472 P.2d 468 (1970), *cert. denied*, 400 U.S. 1023 (1971).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

Questions Presented

1. Did the United States Court of Appeals for the Ninth Circuit lack jurisdiction of this appeal because petitioner failed to apply for a certificate of probable cause from the district court during the statutory 30-day period for filing a notice of appeal and further did not make any application for a certificate of probable cause until some seven months after the 30-day period had expired?

2. Does a plea of guilty in state court by a prisoner in state custody bar federal habeas corpus relief on Fourth and Fourteenth Amendment search and seizure grounds even though State statutory law permits appellate review of such claims after a guilty plea?

Constitutional and Statutory Provisions Involved

In addition to the provisions set forth in the petition for writ of certiorari, respondents call the Court's attention to the following additional provisions:

United States Code, Title 28:

Section 2107.

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature

before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

. . .

Section 2253.

. . .

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

California Penal Code:

Section 1538.5.

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because

(i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

. . .

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

. . .

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.

Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

Federal Rules Involved

Federal Rules of Appellate Procedure:

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

Rule 22. Habeas Corpus Proceedings

(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause

or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

Statement of the Case

The State of California charged petitioner Mann with possessing marijuana and maintaining a place for use of narcotics within California Health and Safety Code sections 11530 and 11557. He pleaded not guilty and moved to suppress the marijuana seized in his home, charging violations of his Fourth Amendment rights.

His motion to suppress evidence was denied after an evidentiary hearing in the California trial court. Petitioner Mann then sought a writ of mandate directing the trial court to suppress the challenged evidence. This writ was denied by the California Court of Appeal and then by the Supreme Court of California.

Mann v. Superior Court, 3 Cal. 3d 1, 88 Cal. Rptr. 380, 472 P.2d 468 (1970), *cert. denied*, 400 U.S. 1023 (1971). The written opinion of the California Supreme Court denying petitioner's writ of mandate had the effect of barring a further California appeal of petitioner's search and seizure claim under the doctrine of the law of the case. *See People v. Medina*, 6 Cal. 3d 484, 492, 99 Cal. Rptr. 630, 635, 492 P.2d 686, 691 (1972).

Thereafter, on January 4, 1971, petitioner Mann pleaded guilty to possession of marijuana. He did not file an appeal from the judgment of conviction entered upon this plea of guilty.

On March 18, 1971, petitioner Mann applied for federal habeas corpus, alleging that he was held in state custody in violation of the Fourth and Fourteenth Amendments to the United States Constitution because the evidence supporting his conviction was the product of an illegal search. In a memorandum opinion filed March 26, 1971, Judge Robert J. Kelleher of the United States District Court for the Central District of California denied the application for a writ of habeas corpus. (Appendix to Petn., pp. 11-15.)

On April 19, 1971, petitioner Mann filed a notice of appeal in the United States District Court. Prior to the expiration of the 30-day period for filing the notice of appeal, petitioner Mann did not apply to the district court for a certificate of probable cause as required by 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure.

On November 26, 1971, respondents filed a motion to dismiss the appeal on the grounds that petitioner Mann had not obtained a certificate of probable cause from either the district court or the Court of Appeals and that such an application for a certificate would no longer be timely. In an order filed on December 10, 1971, a panel of the Ninth Circuit agreed with respondents that such a certificate was a jurisdictional prerequisite to the appeal but held respondents' motion in abeyance in order to afford petitioner Mann "a fair opportunity to make application to the district court. . . ." (Resp. Appendix, *infra.*) The panel stated that, if petitioner Mann secured the certificate from the district court, the appeal would be permitted to proceed; but if, although diligent, he was unsuccessful, then the Ninth Circuit would consider whether or not to issue such a certificate. (*Id.*)

Although petitioner Mann thereafter made a prompt application for a certificate of probable cause from the district court, the district court did not act upon the application for the certificate.* On or about February 18, 1972, petitioner filed a request for a certificate of probable cause in the United States Court of Appeals for the Ninth Circuit. On April 12, 1972, Chief Judge Richard H. Chambers granted a certificate of probable cause instead of referring the matter back to the panel before which respondents' motion to dismiss was then pending.

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*Presumably, the district judge may have felt that he lacked jurisdiction to entertain an application for a certificate of probable cause at this late date.

On July 9, 1973, the United States Court of Appeals for the Ninth Circuit affirmed the district court's order denying the petition for writ of habeas corpus. (Appendix to Petn., pp. 1-10.)

Since the clerk of the Ninth Circuit neglected to serve a copy of the July 9, 1973 opinion on counsel for petitioner, petitioner Mann made a motion to recall the mandate and for relief to file a petition for rehearing. On October 18, 1973, United States Circuit Judge J. Clifford Wallace granted both of these motions and ordered the clerk to file the petition for rehearing. On November 15, 1973, the petition for rehearing was denied and the suggestion for rehearing en banc was rejected.

ARGUMENT

I

The Court of Appeals Lacked Jurisdiction of This Appeal Because Petitioner Failed to Apply for a Certificate of Probable Cause From the District Court Within the 30-Day Period for Filing His Notice of Appeal

Although petitioner Mann presents only a single issue in his petition for a writ of certiorari, a threshold issue confronts this Court. Petitioner did not apply to the district court for a certificate of probable cause for appeal until almost nine months after the district court had dismissed his petition for writ of habeas corpus on March 26, 1971. The prevailing rule is that an application for a certificate of probable cause is not timely unless filed within the 30-day period for taking an appeal pursuant to 28 U.S.C. § 2107. *Ex parte Farrell,* 189 F.2d 540, 544 (1st Cir.), *cert. denied,* 342 U.S. 839 (1951). *Accord: Landry v. Commonwealth of Massachusetts,* 336 F.2d 189, 189-90 (1st Cir. 1964); *Zimmer v. Langlois,* 331 F.2d 424, 425 (1st Cir. 1964); *United States ex rel. Kreuter v. Baldwin,* 49 F.2d 262, 263 (7th Cir. 1931). *But see Fitzsimmons v. Yeager,* 391 F.2d 849, 853-54 (3d Cir. 1968). The law is well-settled that a federal court of appeal has no jurisdiction to entertain a habeas corpus appeal in the absence of a certificate of probable cause or an application for such a certificate. 28 U.S.C. § 2253; F.R.App.P., Rule 22(b); *McGee v. Eyman,* 310 F.2d 230, 231 (9th Cir.), *motion for leave to file cert. denied,* 371 U.S. 917 (1962).

In its order filed December 10, 1971, the Ninth Circuit concluded that the time for applying for a certificate of probable cause was not limited to the thirty days within which to file a notice of appeal. The Court stated:

> ". . . Granted, the certificate constitutes a step, albeit a vital one, in perfecting an appeal, Rule 3 (a), F.R.App.P. provides that 'Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is ground for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . ."
> (Resp. Appendix, *infra.*)

Respondents submit that Rule 3 of the Federal Rules of Appellate Procedure is intended to apply only to appeals "as of right" and not to special appeals permitted only when expressed statutory conditions are satisfied. Since an appeal in a habeas corpus proceedings where the contentions complained of arises out of process issued by a state court falls within the latter category, the obtaining of a timely certificate of probable cause was a prerequisite to jurisdiction on this appeal. 28 U.S.C. § 2253; F.R.App.P., Rule 22(b). Respondents therefore submit that, if certiorari is granted on the sole issue raised by petitioner Mann, then this Court should also grant certiorari to consider this threshold issue of jurisdiction with respect to petitioner's failure to obtain a timely certificate of probable cause.

II

Petitioner's Plea of Guilty Properly Barred Federal Habeas Corpus Relief

In this case, the Ninth Circuit held that, by pleading guilty in the California trial court, petitioner Mann lost his right to raise his Fourth Amendment challenge to the validity of his conviction on federal habeas corpus. Respondents submit that, in so holding, the Ninth Circuit correctly followed this Court's decision in *Tollett v. Henderson*, 411 U.S. 258 (1973).

In *Tollett v. Henderson, supra*, 411 U.S. at 267, this Court stated:

> "We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*."

Since the voluntariness and intelligent character of petitioner Mann's plea of guilty was not questioned in the instant proceedings, petitioner clearly was not entitled to raise his search and seizure claim on federal habeas corpus.

As was stated in *McMann v. Richardson*, 397 U.S. 759, 766 (1970), the plea of guilty constitutes a waiv-

er of the right to contest the admissibility of any evidence the State might have offered against the defendant unless, of course, the applicable law provides otherwise. The fact that California law permits a limited appeal of search and seizure issues after a plea of guilty does not indicate that the plea was any less a waiver of the search and seizure claim on federal habeas corpus than such a plea would be in the absence of statute. Properly construed, petitioner's plea of guilty was a knowing and intelligent waiver of his constitutional defense in all respects other than for purposes of the limited appeal permitted by California Penal Code section 1538.5(m).

It should be further noted that, even if the existence of a state appellate remedy on search and seizure grounds were held to permit federal habeas corpus on those grounds, petitioner Mann had no remedy by way of appeal under California Penal Code section 1538.5 (m) when he pleaded guilty. Having raised his search and seizure claims by a pre-trial writ of mandamus, the published opinion of the California Supreme Court rejecting his claim was law of the case and barred appeal of this issue. *See People v. Medina,* 6 Cal. 3d 484, 492, 99 Cal. Rptr. 630, 635, 492 P.2d 686, 691 (1972).

Lastly, insofar as petitioner argues that the decision of the Ninth Circuit conflicts with decisions of the Second Circuit (Petn., p. 7 and n. 4), this apparent conflict may be explained by the fact that all of the Second Circuit cases were decided prior to this Court's decision in *Tollett v. Henderson, supra.*

Conclusion

For the foregoing reasons, respondents urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Attorneys for Respondents.

RESPONDENTS' APPENDIX

Order

United States Court of Appeals, for the Ninth Circuit.

Thomas Richard Mann, Plaintiff and Appellant, v. Stewart C. Smith, Chief Probation Officer, San Bernardino County, Lowell E. Lathrop, District Attorney, San Bernardino County, Respondents and Appellees.

Evelle J. Younger, Attorney General of California, Real Party in Interest. No. 71-1932.

Filed: Dec. 10, 1971.

Before: MERRILL and KOELSCH, Circuit Judges.

On April 4, 1971, Thomas Richard Mann, a prisoner of the State of California, detained by process issued out of a court of that State, duly filed notice of appeal from a decision of the United States District Court, denying his application for the writ of habeas corpus. Respondent, his custodian, moves to dismiss the pending appeal on the ground that appellant has not secured a certificate of probable cause. Appellant concedes he has never sought a certificate from the trial judge, but argues variously that he need not do so and, in any event, his notice of appeal serves as an application to the judges of this court for a certificate. He is mistaken.

Rule 22(b) F.R.App.P. contemplates that a prisoner-appellant in a habeas action must make application for such a certificate; that the application be initially made to the district judge by whom the decision was rendered; that if the district judge rejects the application and denies the certificate, the appellant may then apply to a circuit judge; however, if appellant has pre-

viously made a request of the district judge and the request was denied, then his notice of appeal shall be deemed to constitute a request addressed to the judges of the Court of Appeals.

Appellee contends that appellant can no longer make application to the district judge; noting that such a certificate is a jurisdictional prerequisite to an appeal, he argues that the time for such application is limited to the 30 days within which to file a notice of appeal. We think not. Granted, the certificate constitues a step, albeit a vital one, in perfecting an appeal, Rule 3(a) F.R.App.P. provides that "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is ground for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . ."

In the circumstances of this case, we deem the imposition of sanction inappropriate at this time. A ruling on appellee's motion will be held in abeyance, in order to afford appellant a fair opportunity to make application to the district court, if he proceeds diligently and secures the certificate then the appeal will be permitted to proceed; if, although diligent, he is unsuccessful, then this court will consider whether or not to issue such a certificate.

To accommodate appellant in these respects, a ruling on appellant's motion will be held in abeyance for the period of 90 days. If no further proceedings are reported by appellant within that period, the appeal will stand dismissed.

/s/ Charles Lee Merrill
/s/ M. Oliver Koelsch
Circuit Judges